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AUG - 4 2005

Federal Communications Commission
Office of Secretary

August 4, 2005

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentations – *Wireline Broadband* Proceeding
CC Dkt. Nos. 02-33, 98-10, 95-20

Dear Ms. Dortch:

On Thursday August 4, 2005, the undersigned had a telephone conversation with Jessica Rosenworcel, Legal Advisor to Commissioner Copps, regarding the above-captioned proceedings.

EarthLink discussed the FCC's Section 214 precedent and process and the need for the Commission to ensure, consistent with the statute, that the public convenience and necessity will not be adversely affected by the withdrawal of today's broadband services in any community, 47 U.S.C. § 214(a). EarthLink provided the attached documents concerning the FCC's precedent regarding Section 214 discontinuances.

Pursuant to the Commission's rules, please find two copies of this filing for inclusion in the public record of the above-referenced dockets. Please do not hesitate to contact me directly if you have any questions.

Respectfully submitted,

Donna N. Lampert
Counsel for EarthLink, Inc.

cc: Jessica Rosenworcel

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~~DOCKET FILE COPY ORIGINAL~~ 02-33

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EDWARD J. MARKEY
7TH DISTRICT, MASSACHUSETTS
www.house.gov/markey

ENERGY AND COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS AND
THE INTERNET
RESOURCES COMMITTEE

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Washington, DC 20515–2107

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July 2, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Chairman:

I am writing with respect to recent announcements by WorldCom that it has discovered serious financial accounting inaccuracies and to subsequent media reports regarding the possible imminent bankruptcy of the company. Obviously, the collapse of the nation's second largest long distance carrier would be a significant and unprecedented event.

I am concerned that any decision by WorldCom management to seek bankruptcy protection could prove disruptive to essential communications as well as economic activity in our country. As you well know, WorldCom has millions of subscribers in the residential and business telecommunications marketplace and also operates valuable assets associated with Internet connectivity and web-based telecommunications services.

Whether WorldCom will actually go into bankruptcy is unknowable at this point in time. I believe it is wise, however, for the Commission to prepare adequately for such an event in order to minimize any harm to the public and to ensure that telecommunications services continue if bankruptcy does occur. The law provides the Commission with ample authority to protect the public in the event of a bankruptcy. For example, Section 214(a) of the Communications Act stipulates, in part, that ***"No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby...."*** [47 U.S.C. 214(a)].

While the Commission chose not to intervene directly to ensure continuity of service when Excite@Home and Northpoint Communications went bankrupt last year and cut-off Internet access for tens of thousands of Americans, I hope you agree that the hazards posed to the public if WorldCom were to go bankrupt go to the core of the Commission's responsibilities. In addition to the millions of Americans who subscribe to WorldCom for traditional telephone service, WorldCom is also responsible for carrying a vast portion of the nation's email traffic. In fact, some analysts calculate WorldCom's

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email traffic carriage to be as high as 70 percent of those emails that travel within the United States and 50 percent of all such traffic worldwide.

Continuity of service will be critical for the stability of the nation's telecommunications network and the quality of service to consumers. In the event of a bankruptcy, consumers must have ample opportunity to find service alternatives. Moreover, related industries will require sufficient time to ascertain how traffic may be continued or how additional subscribers and services can be accommodated by other providers.

I urge the Commission to take such steps as may be necessary to ensure the *continuation of service to subscribers* in the event that WorldCom goes into bankruptcy. In addition, I further recommend that the Commission work with WorldCom officials now to ensure that any layoffs that may occur as a result of, or just prior to, any bankruptcy do not lead to service quality deterioration or interruption of telecommunications service to any segment of the public.

At your earliest convenience, please provide me with your thoughts on these matters. Specifically, I am interested to know what the Commission is doing now to prepare for a possible bankruptcy and to safeguard service quality. Secondly, should a WorldCom bankruptcy occur, I am eager to know what the Commission is prepared to do to assure consumers that their service not be shut-off or that service quality will not suffer.

Thank you in advance for your time and attention to this issue.

Sincerely,

Edward J. Markey

Edward J. Markey
Ranking Democrat
House Subcommittee on
Telecommunications and the Internet

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02-33

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 10, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA FACSIMILE TRANSMITTAL
AND HAND-DELIVERY

The Honorable Edward J. Markey
Ranking Member
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Markey:

Thank you for your letter of July 2, 2002, regarding WorldCom's disclosure of financial accounting inaccuracies and the possibility of the company's bankruptcy. In your letter, you asked what the Commission is doing "to prepare for a possible bankruptcy and to safeguard service quality," and also, in the event of a WorldCom bankruptcy, what the Commission will do "to assure consumers that their service will not be shut-off or that service quality will not suffer."

I am deeply troubled by WorldCom's recent disclosures and share your concern about the impact on consumers and the nation's telecommunications infrastructure if WorldCom or its creditors were to initiate bankruptcy proceedings. In direct response to your questions, I assure you that the Commission has already taken action to protect the public interest in general and WorldCom's customers in particular, and will continue to take such actions as are necessary and consistent with our authority under the Communications Act.

Over the last two weeks, I personally have taken steps to ensure that the Commission has and continues to receive the most up-to-date information about WorldCom's developing situation. I met with John W. Sidgmore, Chief Executive Officer of WorldCom, to hear about the company's financial situation and ability to maintain service quality first-hand and, since that initial meeting, have engaged in regular communications with Mr. Sidgmore and will continue to do so for the foreseeable future. Within three days of WorldCom's first announcement that it had discovered financial accounting irregularities, I met with representatives of the telephone industry, financial analysts and debt-rating agencies to gain an understanding of WorldCom's immediate situation and also discuss how these developments impact the telecommunications industry. Additionally, I have participated actively in interagency discussions to ensure a broad understanding of WorldCom's impact on the government's use of telecommunications and its impact on the industry, as a whole. I will continue to keep these lines of communication open and active for as long as the current situation persists. Finally, as you know, I was appointed to

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serve on the new inter-agency Corporate Fraud Task Force to offer the Commission's expertise to assist in efforts to investigate and prosecute significant financial crimes and restore credibility to and confidence in the market.

My personal efforts are only one part of the hard work the entire Commission has undertaken to minimize the threat of a WorldCom bankruptcy to continuity of service. The Commission's staff has worked with WorldCom executives and conducted its own independent research so that our information regarding the extent of WorldCom's operations and its customer base are up-to-date. The Commission's staff has also spoken with anxious consumers, other carriers, and other government agencies, both to provide them with information the Commission has about the current situation and our processes, and also add to our own understanding of the scope of the problem. We have been in extensive consultation with state public utility commissions to explore coordinated responses to carrier bankruptcies. These state public utility commissions also have responsibility to ensure continuity of local and intrastate services and may be, in some cases, better placed to act quickly to prevent a catastrophic loss of service. In short, the Commission is gathering the information and developing the tools we need to deal with whatever situation may arise in coming weeks.

If a WorldCom bankruptcy were to occur, the Commission will act vigilantly and to the full extent of our statutory authority to prevent a catastrophic loss of service. Although I agree with you that a WorldCom bankruptcy would be a significant and unprecedented event, it is not necessarily the case that such a bankruptcy would result in a discontinuance of service to consumers. Indeed, carriers filing for reorganization under Chapter 11 of the Bankruptcy Code must still continue to provide service during the pendency of bankruptcy proceedings, and the Commission has seen a number of bankruptcies result in reorganization or an acquisition of the troubled carrier with no discontinuance of service at all. If WorldCom were to file for bankruptcy, it is possible that the Commission would not need to intervene to prevent service discontinuance, but would instead need to review applications for transfers of control of WorldCom's federal licenses and authorizations. The Commission would be well placed to do so given our efforts to gather information and communicate with the company.

If, however, a bankruptcy were to lead to a discontinuance of service, the Commission would act as quickly as possible to protect the integrity of the nation's telecommunications network and services provided to mission critical government functions. As you stated in your letter, the foundation of our authority to protect consumers from an abrupt discontinuance of service is section 214(a) of the Communications Act of 1934, as amended. Section 214(a) states, in pertinent part, that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." 47 U.S.C. § 214(a). Our rules implementing this statute provide consumers the opportunity to find an alternative service provider by requiring the carrier to send individual

written notices to each consumer affected by the discontinuance. 47 C.F.R. §§ 63.60, *et seq.* The carrier is then prohibited from discontinuing service for a minimum period of thirty-one (31) day from the date the carrier's notice of discontinuance is released on public notice by the Commission. This thirty-one (31) day period is, however, a minimum period, and the Commission may extend it if consumers would be unable to receive service or a reasonable substitute from another carrier, or if the Commission otherwise finds that the public convenience and necessity is adversely affected.

Over the past year, the Commission has acted repeatedly to ensure that carriers observe the discontinuance requirements, and thereby provided consumers an opportunity to migrate. The agency has devoted a great deal of time to working with carriers to make sure that they understand the requirements, and has made a number of appearances in bankruptcy court proceedings to advise the court when the requirements had not been met, or when action by the court might have caused an unnoticed discontinuance of service. The end result is that the industry has, so far, weathered numerous carrier bankruptcies without significant disruptions of service to end-users.

The two discontinuances mentioned in your letter, Northpoint Communications and Excite@Home, have given the Commission important experience in dealing with bankruptcy and discontinuance of service. Northpoint Communications did not observe our regulatory requirements and provided seventy-two (72) hours notice of its discontinuance of service without any advance warning to the Commission. We thus were unable to take effective, timely action to protect consumers. The Commission has, however, incorporated the lessons from this experience into our process, and has taken proactive steps to work with troubled carriers in advance, as I have described above. The services provided by Excite@Home were not within the scope of the services to which section 214 applies. I did, however, urge the bankruptcy court to entertain our public policy concerns (a copy of the letter I sent is attached). Additionally, we worked directly with individual companies to facilitate an orderly transition of customers.

Again, I want to assure you that we are doing the hard work necessary to protect the public interest in this unfortunate situation. Please do not hesitate to contact me if you need further information regarding our efforts.

Sincerely,

Michael K. Powell
Chairman

attachment

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510–6125

July 12, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Powell:

Over the course of the past year, the telecommunications industry has experienced significant economic disruption. Hundreds of thousands of jobs have been lost and the total debt load of telecommunications companies rivals that of the savings and loans and junk bond industries combined. This meltdown has been influenced by a number of critical factors, including the overall downturn in the economy, the current crisis facing the financial markets, poor business judgements, and now most recently revelations of massive accounting fraud at WorldCom has raised questions about the financial health of the entire telecom sector.

As it stands, numerous companies have entered bankruptcy, while others are on the brink of bankruptcy. Clearly this raises the previously unimaginable possibility that millions of consumers risk significant disruption of their basic telephone and data services. The Communications Act provides explicit authority to the Federal Communications Commission to prevent service disruption. Section 214 (a), in part, provides: "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby. . ."

While there have been many telecommunications companies that have entered bankruptcy or are under extreme financial distress, three companies, Global Crossing, Qwest, and WorldCom are at the forefront of the news. While those responsible at these companies must be punished – with criminal penalties where appropriate – a disruption of service could lead to loss of local, long distance, and/or international telecommunications service to both residential and business customers. Consumers rely on these services and expect that these services will be readily available to them. To assure that all possible steps are being taken to prevent such debilitating disruptions, please provide any contingent plans that exist or steps the FCC has taken to ensure uninterrupted service. In addition, please discuss what, if any, coordination has occurred between the Commission and the state Public Utility Commissions Moreover, should you believe that the FCC needs additional statutory authority to appropriately address this issue

please include that in your response. The U.S. telecom sector is the world's finest and it is my expectation that the FCC works to insure that it remains so even during this most difficult period.

Additionally, I must stress that a failing in some parts of the industry has been due to fraudulent accounting. I have examined similar accounting issues in the Commerce Committee with respect to the Enron Corporation and, with respect to the telecommunications industry, I have advocated consistently that the FCC not reduce or eliminate its existing accounting requirements. While the FCC's accounting requirements do not directly protect shareholders or investors, they do protect consumers from being overcharged for service. In this environment it is also clear that relying solely on the financial records companies provide Wall Street is an insufficient basis to determine whether consumers are being protected. I understand that the FCC has a proceeding pending in which it is seeking to reduce its accounting requirements even further. In today's context, the deregulatory nature of this proceeding appears ill-advised.

Rather, your task should be to review the FCC's current accounting oversight authority and, in conjunction, with the state Public Utility Commissioners work to enhance the FCC's accounting rules to help protect consumers in this environment. While it is unlikely that additional accounting rules would have prevented outright fraud, perhaps they could help mitigate against these problems in the future.

I trust that you understand that under these circumstances your foremost responsibility is to protect the integrity and reliability of the Nation's telecommunications network as well as to ensure continued service to consumers during this turbulent time. Please provide a timely response so that the Committee may proceed with its work in this matter.

Sincerely,

Ernest F. Hollings

EFH/amk

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

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OFFICE OF
THE CHAIRMAN

July 15, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND-DELIVERY

The Honorable Edward J. Markey
Ranking Member
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Markey:

Last week, you issued a press statement responding to my letter of July 10, 2002, regarding the action this Commission has taken and will take to protect customers as WorldCom's situation continues to develop. Although your original letter did not specifically raise the applicability of section 214 to broadband Internet access services, your press statement that the Commission is powerless to protect broadband consumers prompts me to write to clarify several apparent misunderstandings regarding the scope of our authority and our approach to implementing the intent of Congress as set forth in the Communications Act ("the Act").

First, I appreciate your concerns and this opportunity to reiterate and emphasize that there is no question or issue concerning section 214's applicability to WorldCom. As we both have recognized, this Commission will act vigilantly and to the full extent of our statutory authority to ensure that consumers' interests are protected should WorldCom enter into bankruptcy. Ensuring continuity of service for consumers is our highest priority in the wake of the troubles facing many companies in the telecommunications industry today.

Second, I did not suggest that we are powerless to protect consumers and prevent service disruptions by any entity providing any type of communications service. In the case of Excite@Home, for instance, the Commission was an active participant and advocate in protecting consumer interests, as we engaged all the companies involved and the bankruptcy court itself to ensure that consumer interests were both contemplated and protected. Indeed, I urged the bankruptcy judge to "balance not just the interests of one debtor and its creditors, but also those of millions of customers and the American public" and that he, at a minimum, "provide for an orderly transition rather than a precipitous shutdown of Excite@Home, to avoid

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disrupting broadband service to a significant percentage of U.S. customers." Our involvement was largely successful as a majority of consumers were migrated to new networks expeditiously and without an excessive service disruption.

As to section 214's inapplicability to Excite@Home, it is important to note that the company was not a "carrier" (whether a common carrier, telecommunications carrier or cable operator), but an Internet Service Provider ("ISP"), akin to AOL, Earthlink and Juno. As you know, ISPs do not incur any obligations under Title II of the Act. Because Excite@Home and the services provided by it had never been regulated as carrier services, by this or any previous Commission, any application of section 214 to Excite@Home would have been an unprecedented and unsupported extension of our authority under that provision. At no time, however, did this impede the Commission from intervening to protect the American public's interest and we will continue to do so where and when it is warranted.

Third, with respect to a carrier, it is not clear that section 214 could not be applied to any service offered by that carrier. Section 214(a) does not define either the class of "carrier" or the class of "services" to which the Commission's authority runs ("No carrier shall discontinue, reduce, or impair service to a community..." (47 U.S.C. § 214)). This, of course, is a consequence of the fact that this provision was written in 1934, as part of the original Communications Act, a time where there were no classes of carriers or services.

Fourth, our ongoing broadband proceeding specifically anticipated the concerns you raise and considers how to continue to protect consumers regardless of the classification of broadband Internet access services. *See* In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3045-47 (2002). Noting that "section 214 of the Communications Act limits the ability of a telecommunications carrier to unilaterally discontinue telecommunications service to consumers," the Commission asks interested parties to "address the extent to which it is appropriate or necessary to apply such a requirement to the provision of wireline broadband Internet access service if we classify such services as information services." *Id.* at 3045.

Finally, given that bankruptcies have increased, regrettably, the Commission would greatly benefit from a more definitive and concise statement of its authority to prevent service disruptions for consumers. In this regard, I invite you and your colleagues on the Committee to explicitly extend the Commission's authority to impose discontinuance requirements on other carriers and services within our jurisdiction.

I look forward to working with you and other members of the Committee as we jointly navigate these troubled times facing the telecommunications industry.

Sincerely,

Michael K. Powell
Chairman

cc: The Honorable W.J. ("Billy") Tauzin
The Honorable John Dingell
The Honorable Fred Upton

EDWARD J. MARKEY
7TH DISTRICT, MASSACHUSETTS
www.house.gov/markey

ENERGY AND COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
RESOURCES COMMITTEE

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Congress of the United States
House of Representatives
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July 17, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

02-33

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Powell:

Thank you for your additional letter of July 15, 2002, regarding the Commission's approach to consumer protection in the face of telecommunications bankruptcies. I take this opportunity to correct certain apparent misunderstandings regarding the Commission's authority and to comment further upon the Commission's approach to these issues.

First, your response highlights yet again the policy inconsistency to which my press statement alluded; namely, that although you believe the Commission has authority to address consumer protection interests as contained in Section 214 of the Communications Act with respect to a possible WorldCom bankruptcy, and in the case of last year's Northpoint Communications bankruptcy, you did not believe this to be the case when Excite@Home went bankrupt. I appreciate the fact that you wrote the bankruptcy judge at the time suggesting that the court provide protection to consumers. Such correspondence to the court, however, is no substitute for the inherent ability of the FCC to act on its own.

I had noted in my statement that, for consumers, the service received from Northpoint and the service from Excite@Home, were essentially the same service, although one is offered over telephone wires and the other, by cable operators over cable facilities. Consumers utilized both services to obtain broadband access to the Internet.

You asserted in your correspondence to me that Excite@Home was merely an Internet Service Provider (ISP) – "akin to AOL, Earthlink, and Juno" -- and was not a carrier. Because it was not a carrier, you stipulate that it is not covered by the provisions of law giving authority to the FCC to step in, if necessary, to ensure continuity of service.

I believe this mischaracterizes the Excite@Home service that consumers received. As you may recall, at the time the cable industry offered consumers Excite@Home as

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part of an exclusive, bundled service. A subscriber received both the unregulated, ISP service and the broadband transport to reach that service jointly.

When Excite@Home went bankrupt it had roughly 4 million customers. Subsequent to service shut-offs, the vast majority of consumers were irate not because they could no longer obtain the particular ISP "Excite@Home," but rather, because its collapse brought to an abrupt halt their *broadband access to the Internet through any other ISP.*

Even if one were to contend that Excite@Home was solely an ISP, i.e., divorced from any transport carriage, it is clear that such carriage had to have been provided to consumers by some entity – in this case, it was Excite@Home's owners: several very large cable MSOs. I believe these "owner-carriers" surely must answer to the FCC's Section 214 authority for the broadband access to ISPs they provide to cable consumers. In fact, your letter notes that "with respect to a carrier, it is not clear that section 214 could not be applied to any service offered by that carrier."

You chose not to assert this point with either Excite@Home or its cable industry owners at the time and it is now too late for those affected by the Excite@Home shut-offs anyway. In the future, I hope you will be less reluctant to assert, on behalf of consumer interests, any and all FCC authority to prevent abrupt service disruptions.

Second, your response of July 15, 2002, underscores starkly the key point I raised last week. Pending proposals before the Commission will render the risk to consumers greater in the event of bankruptcies if the Commission re-defines or re-classifies the DSL-based carriers, which today are covered by Section 214, so that they are treated as cable modem-based carriers, which the Commission *de facto* considers not covered by Section 214 and other provisions of Title II. If it endorses such proposals, the Commission will have re-defined itself out of authority to invoke the consumer protection provisions of Section 214, not only in the case of cable modem-based services such as Excite@Home, but also with respect to DSL-based services. Millions of additional consumers would be left unprotected from bankruptcy-induced shut-offs.

Third, your letter further notes that Section 214 was written in 1934, when there were no classes of carriers or services. As you know, Congress has amended the Communications Act numerous times since 1934. Most significantly, in 1996, Congress specifically re-oriented national telecommunications policy to encourage competitive entry by other carriers, which we hoped, would innovate and offer consumers an array of services. In other words, Congress not only knew there were other classes of carriers and services, but was actively changing the law to endorse such a telecommunications future. Congress had an opportunity at that time to also limit the scope of Section 214 so that it

would not cover new carriers or new classes of services. It did not enact any such limitations.

You have invited me and my colleagues to enact legislation to "extend the Commission's authority to impose discontinuance requirements on other carriers and services within our jurisdiction." Given the broad scope of Section 214, I believe it is clear that we do not need to do so.

The Commission has all the authority it needs under Section 214 to protect consumers in the event of bankruptcies. The only limitation on such authority to address service quality and service disruptions from carriers will be limitations that the Commission places upon itself. Again, I urge you and your fellow Commissioners to re-think the wisdom of many of the proposals you have pending before you with respect to broadband policy. Many such proposals fundamentally depart from the statutory structure upon which the Congress built the Telecommunications Act of 1996, and this correspondence has illuminated but one policy pitfall.

I respectfully request that you submit my letters to you, as well as your responses back to me, as part of the formal proceeding before the Commission, *In the matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33). I look forward to continuing to work with you and your fellow Commission members on these and other matters in the future.

Sincerely,

Edward J. Markey

Edward J. Markey
Ranking Democrat
House Subcommittee on Telecommunications
and the Internet